Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
The Division of the Ratepayer	)	CC Docket No. 00-49
Advocate Petition for Declaratory	)	
Ruling Seeking Preemption of Certain	)	
Legal Requirements Imposed on	)	
Telecommunications Carriers By the	)	
New Jersey Board of Public Utilities	)	
Relating to Section 251 and 252 of the	)	
Telecommunications Act of 1996	)	

THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE'S PETITION FOR A DECLARATORY RULING SEEKING PREEMPTION OF PORTIONS OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES' GENERIC PROCEEDING ORDER

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INTRODUCTION & EXECUTIVE SUMMARY

The Division of the Ratepayer Advocate ("Ratepayer Advocate"), hereby petitions the Federal Communications Commission ("FCC") pursuant to Sections 1.1 and 1.2 of the FCC's Rules, 47 C.F.R. §§ 1.1 and 1.2 and pursuant to the Supremacy Clause of the U.S. Constitution[1] and Sections 251, 252, and 253 of the Communications Act of 1934, as amended (the "Act")[2] to preempt certain legal requirements imposed on telecommunications carriers by the New Jersey Board of Public Utilities ("Board") which are inconsistent with and conflict with the Act, the FCC's implementing regulations and orders related thereto ("Petition"). Specifically, the Ratepayer Advocate requests that the FCC issue a declaratory ruling finding that the Board's setting of permanent rates for Unbundled Network Elements ("UNEs") and resale in BPU Docket No. TX95120631, by Order dated December 2, 1997 (referred to as the "Generic Proceeding") is inconsistent with and violates the Supremacy Clause, Sections 251, 252, and 253 of the Act, the regulations implementing these Sections, and applicable FCC orders. The Ratepayer Advocate supports this Petition with the Attached Affidavit.

Background

1. The Ratepayer Advocate is an independent agency of the State of New Jersey. The Ratepayer Advocate was established by the Governor of New Jersey under the Reorganization Plan No. 001-1994 ("Plan"), which was codified and is set forth in *N.J.S.A.* 13:1D-1. The Ratepayer Advocate represents the interests of all utility consumers - residential, small business, commercial

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[1] U.S. Const., art. VI, cl. 2 (Supremacy Clause).

[2] 47 U.S.C. §§ 251, 252, 253. These provisions were added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. §§151 *et seq.*

and industrial. The Ratepayer Advocate is expressly authorized to appear as a party on behalf of ratepayers in all utility matters that are before the Board. *N.J.S.A.* 13:1D-1. Section 9 of the Plan sets forth the authority of the Ratepayer Advocate as follows:

a. assist, advise and cooperate with the B[PU] Commissioners in the exchange of information and ideas in the formation of long term energy policy and goals which impact all New Jersey's ratepayers;

b. negotiate with utilities on behalf of the ratepayers in an effort to reach an accommodation of views with respect to proposed rate increases;

c. appear before the BPU on behalf of ratepayers to the same extent the Rate Counsel is currently authorized to appear; [3] (footnote added)

d. sit on the Advisory Council on Energy Planning and Conservation and on the Energy Master Plan Committee; and

e. appeal any determination, finding, or order of the BPU determined by the Director of the Division to be adverse to the ratepayer interest. *N.J.S.A.* 13:1D-1(9)

The Generic Proceeding

2. On December 8, 1995, the Board initiated an investigation and rulemaking proceeding to determine the terms and conditions under which local exchange competition should be allowed in New Jersey. A Notice of Pre-proposal and Notice of Investigation (NOI) was commenced. This proceeding, under Docket No. TX95120631, is generally referred to as the "Generic Proceeding".[4] The NOI provided for comment period which was originally set to expire on February 15, 1996, but

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[3] The Ratepayer Advocate is authorized to appear before the Board to the same extent that the Division of Rate Counsel was authorized by *N.J.S.A.* 52:27E-18 to appear. *N.J.S.A.* 52:27E-18 provides in pertinent part that "[t]he Division of Rate Counsel shall represent and protect the public interest...in proceedings before and appeals from any State department, commission, authority, council, agency or board charged with the regulation or control of any business, industry or utility regarding a requirement that the business, industry or utility provide service or regarding the fixing of a rate, toll, fare or charge for a product or service".

[4] The case caption of this proceeding is *I/M/O The Investigation Regarding Local Exchange Competition for Telecommunications Services.* The Ratepayer Advocate participated in the Generic Proceeding by conducting discovery, filing testimony, cross examination of witnesses, and filing briefs.

was extended to March 1, 1996. The NOI proceeding was commenced prior to the passage of the 1996 Act.

3. On February 8, 1996, the Congress of the United States passed the Telecommunications Act of 1996 and President Clinton signed it into law. The Act created a new paradigm. The Act was designed to secure lower prices and higher quality services for American telecommunications consumers, and to encourage the rapid deployment of new technologies by promoting competition and reducing regulation of the telecommunications industry. The Act enabled any telecommunications carrier to enter into an interconnection agreement with the incumbent local exchange carrier ("ILEC") pursuant to statutorily created rights and procedures as set forth under Sections 251 and 252 of the Act. State commissions were given the option to participate in the process. If they declined to participate, the FCC would assume a State commission's obligations.

4. On March 1, 1996, AT&T Communications of New Jersey, Inc. ("AT&T") requested interconnection negotiations with Bell Atlantic - New Jersey, Inc. ("BA-NJ"), the ILEC, pursuant to Section 252 (a) of the Telecommunications Act of 1996. On June 20, 1996, the Board, in response to the NOI and the passage of the Act, agreed to act as the principal regulatory body in the processes mandated by Sections 251 and 252 of the Act. On June 20, 1996, the Board issued a Decision and Order in the Generic Proceeding that established a two step process. The Board stated that, as the first step, it would await the receipt of negotiated agreements or arbitration requests and utilize that process to determine the appropriate rates, terms, and conditions of interconnection for the parties involved. As a second step, the Board initiated a rulemaking with a fact finding component with the expressed intent to establish generally available terms and conditions that would be available as an option to any entity choosing to provide service in New Jersey, thereby avoiding

the need to arbitrate and negotiate each and every agreement.[5] The Board further stated that the generally available terms and conditions that would result from the Generic Proceeding would not supersede arbitrated terms and conditions or those contained in negotiated agreements, but would be offered as guidelines for all entities who were not parties to either negotiated agreements or arbitrated determinations.[6]

5. On July 15, 1996, AT&T filed a petition with the Board for arbitration of certain issues that AT&T and BA-NJ were not able to resolve through negotiation undertaken pursuant to Section 252 (b) of the Act of 1996 (Docket No. TO96070519). On August 9, 1996, BA-NJ filed its response to AT&T's arbitration petition.

6. On August 15, 1996, the Board issued its *Telecommunications Order* in Docket No. TX96070540, adopting procedures for negotiation, mediation, and arbitration of interconnection agreements under the Act, in which it re-affirmed its intent to establish generally available terms and conditions so as to avoid the need for negotiation or arbitration of each and every company's request.[7] The Board retained Paul B. Thompson, a retired New Jersey State Judge, to conduct arbitrations and otherwise act on behalf of the Board consistent with the Act and the Board's *Telecommunications Order*.

7. From September 23, 1996 through October 15, 1996, AT&T and BA-NJ participated in an extensive arbitration proceeding during which both AT&T and BA-NJ submitted evidence and

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[5] *See I/M/O of the Notice of Pre-Proposal and Notice of Investigation Regarding Local Exchange Competition for Telecommunications Services*, dated June 20, 1996 (*Decision and Order*).

[6] *Id.* at page 2.

[7] *See I/M/O Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996*, Docket No. TX96070540, (*Telecommunications Order*) at p. 16.

testimony, and each party was permitted cross examination of witnesses. Both parties filed post arbitration briefs summarizing the evidence and bases for their respective positions. AT&T also filed a reply to BA-NJ's post arbitration brief. BA-NJ chose not to submit any cost studies and relied exclusively on the FCC's default rates, despite BA-NJ's participation in the arbitration proceedings and challenge of AT&T's cost models.[8]

8. On November 8, 1996, the Arbitrator issued his decision resolving the disputed issues between AT&T and BA-NJ, finding that AT&T's cost model (with some modifications), properly calculated the forward-looking, economic costs of providing interconnection and network elements. Relying on this model, the Arbitrator set permanent rates for interconnection, unbundled elements, and wholesale discounts. The Arbitrator specifically rejected BA-NJ's claim that it did not have the time to perform the necessary cost study, stating that "the task could have been accomplished." The Arbitrator adopted the Total Element Long Run Incremental Cost (TELRIC). After the decision was issued, negotiation ensued for a detailed interconnection agreement using the rates set by the Arbitrator.

9. On January 16, 1997, as part of the Generic Proceeding, the Board asked for comments as to whether it should amend its prior rulings that Generic Proceeding provisions would not supersede negotiated/arbitrated provisions, and whether any negotiated/arbitrated provisions should be interim pending the outcome of the Generic Proceeding.

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[8] Initially, BA-NJ chose to submit cost studies but later withdrew them. On October 28, 1996, BA-NJ argued, in the Generic Proceeding, that the arbitration rates should be used as interim rates and that they should be superseded by the rates set in the Generic Proceeding. On November 1, 1996, Board Counsel issued a letter to the parties stating that the 8th Circuit's stay order was limited. In that letter, counsel did not adopt BA-NJ's request to treat the arbitrated rates as interim rates. On November 19, 1996, BA-NJ moved the Board to overturn the Judgment of the Arbitrator. BA-NJ argued that the rates set in the arbitration should be replaced with the FCC's default rates on an interim basis and that permanent rates should be established in the Generic Proceeding. On January 7, 1997, BA-NJ withdrew its November 19, 1996 motion.

10. On July 15, 1997, BA-NJ and AT&T finalized an interconnection agreement. The interconnection agreement contained the rates set by the arbitrator.

11. On July 17, 1997, at a public agenda meeting, as part of the Generic Proceeding, the Board established generic rates, terms and conditions that exceeded the provisions that resulted from the AT&T/BA-NJ arbitration. On July 23 and 25, 1997, BA-NJ refused to sign the interconnection agreement unless the rates set in the arbitration were replaced with the rates set in the Generic Proceeding.[9]

12. On September 9, 1997, at a regularly scheduled public agenda meeting, the Board ruled that the rates established in the arbitrated proceeding would be superseded by the rates established in the Generic Proceeding. Accordingly, the Board directed the parties to the arbitration to submit a fully executed agreement reflecting the Board's decision to supersede the arbitrated rates with the generic rates.[10] On October 8, 1997, the Board orally approved the BA-NJ version of the agreement at a public meeting and subsequently issued an Order memorializing that decision on December 22, 1997.

13. On November 24, 1997, AT&T filed a Complaint in the Federal District Court for the District of New Jersey seeking review under Section 252(e)(6) of the Act, and naming as

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[9] On July 25, 1997, AT&T executed and submitted for Board approval, per Section 252 (e) of the Act, an interconnection agreement that incorporated the arbitrated provisions. On August 5, 1997, BA-NJ submitted a second interconnection agreement (not executed by both sides) incorporating the rates set in the Generic Proceeding. Both AT&T and BA-NJ jointly proposed a briefing schedule. Each agreed to accept and execute the agreement not rejected by the Board. All parties expressly reserved their rights to challenge the Board's decision.

[10] On September 15, 1997, AT&T and BA-NJ executed BA-NJ's version of the interconnection agreement with the generic rates. AT&T, by letter dated of the same date, informed the Board that AT&T had executed BA-NJ's version only because the Board had ruled that generic rates would supersede the arbitrated rates and had effectively rejected AT&T's version of the interconnection agreement. AT&T specifically reserved the right to appeal the Board's rejection of the arbitrated rates and to challenge the rates set forth in the Agreement.

defendants BA-NJ, the Board, and its Commissioners in their official capacities.[11]

14. On December 2, 1997, as part of the Generic Proceeding, the Board issued an Order memorializing the decisions made orally at the July 17, 1997; September 9, 1997 and October 8, 1997 open meetings.

15. The Board's Generic Proceeding Order established permanent rates for UNEs and resale discount rates. Each rate is both a minimum and maximum rate for the particular UNE or resale discount. The Board directed that these permanent rates supersede and replace interim and permanent arbitrated rates established under Section 252 of the Act. The Board will not review an interconnection agreement, whether negotiated or arbitrated, unless the permanent rates are included therein. All interconnection agreements and resale agreements approved by the Board to date

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[11] On January 12, 1998 AT&T filed an Amended Complaint which included additional exhibits including the Board's Orders dated December 2, and December 22, 1997. On January 29, 1998, the Court executed a Consent Order for Intervention by the Ratepayer Advocate in this case, and such Order was entered on February 2, 1998. The Ratepayer Advocate filed for summary judgment raising the following issues:

(a) whether the Board's action below is *Ultra Vires* and lacks authority under Sections 251 and 252 of the Act to substitute Generic Proceeding provisions for arbitrated provisions;

(b) whether the Supremacy Clause of the United States Constitution preempts the Board's action in substituting Generic Proceeding provisions for arbitrated provisions;

(c) whether Section 253 of the Act and the FCC's *Memorandum Opinion and Order* in FCC 97-346. 13 FCC Rcd 3460 (1997) preempts the Board's action in substituting Generic Proceeding provisions for arbitrated provisions;

(d) whether, as a matter of law, the AT&T/BA-NJ interconnection agreement with arbitrated provisions meets the requirements of Section 251 and the regulations implementing that section or alternatively, whether the interconnection agreement meets the standards set forth in Section 252(d). If it does, the AT&T and BA-NJ interconnection agreement with arbitrated provisions should be re-instated; and

(e) whether BA-NJ has waived any rights to challenge the Arbitration Award due to its failure to assert objections during the arbitration proceeding or otherwise reserve its rights in said proceeding that the Arbitrated Award does not meet the requirements of Section 252(e)(2)(B).

AT&T and BA-NJ filed other dispositive motions. The FCC intervened and filed *Amicus Curiae* briefs. Oral argument was held on June 15, 1999. The parties are still waiting for the District Court's decision on the merits.

contain the permanent rates established by the Board. No Telecommunications carrier has been able to negotiate or arbitrate with Incumbent Local Exchange Carriers ("ILECs") for rates that differ from the Board's permanent rates.

The FCC Standards for Preemption Under The Supremacy Clause And Section 253 Of The Act.

16. The government of the United States, though limited in its powers, is supreme and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary not withstanding". See *McCulloch v. Maryland*, Md.1819, 17 U.S. 406, 4 Wheat, 406, 4 L.Ed. 579 (1819). The Board's action in establishing permanent rates is both a regulatory action that has the force and effect of law and the imposition of a legal requirement which affects telecommunication carriers rights under Sections 251 and 252 of the Act. The test to determine whether both federal and state regulations may operate or if the state regulation must give way is whether both regulations can be enforced without impairing federal superintendence of the field, not whether they are aimed at similar or different objectives. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L.Ed.2d 248, (1963), *rehearing denied* 374 U.S. 858, 83 S. Ct. 1861, 10 L.Ed.2d 1082 (June 1963). State law will be considered preempted if compliance with both state and federal law is impossible or if state law inhibits conduct that federal law specifically encourages. *See, Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408 (E.D. N.Y., 1992), *affirmed* 3 F.3d 602 (2nd Cir. 1993) *cert denied*, 510 U.S. 1073, 114 S. Ct. 883, 127 L.Ed.2d. 78 (1994). In the absence of express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies the legislative field as to make reasonable the inference that Congress left no room for

states to supplement it. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Federal preemption of state law may be either express or implied, and is compelled whether Congress' command is explicitly stated in statutory language or implicitly contained in its structure and purpose. *See, Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), *on remand* 966 F.2d 1512 (5th Cir. 1992).

17. The Act contains explicit provisions for the preemption of state laws, regulations or legal requirements if they may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[12] If the Board's action in setting permanent rates is in conflict with or is inconsistent with the statutory scheme of the Act, then under the doctrine of preemption, the statutory scheme established by Congress can not be undermined or ignored by the Board. The Ratepayer Advocate submits that Section 253(d) of the Act explicitly authorizes preemption when the conditions of Section 253(a) have been met and that the Supremacy Clause of the United States Constitution is a separate and independent basis for invoking preemption in this matter. Inconsistent and conflicting state regulations, rules or laws must yield to federal law.

18. In 1997, the FCC addressed, in the *Memorandum Opinion and Order,*[13] the scope of its preemption authority under both the Supremacy Clause of the U. S. Constitution and under the Act, and how the FCC would apply it. The FCC found that it had explicit preemption authority and

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12 *See* Section 253(a) of the Act.

13 *See I/M/O the Public Utility Commission of Texas; The Competition Policy Institute, Inc., ICG Group (USA), Inc. And ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation. And MFS Communications Company, Inc.; Teleport Communications Group, Inc.; City of Abilene, Texas; Petitions for Declaratory Ruling and/or preemption of Certain Provisions of the Texas Public Utility Regulatory, Memorandum Opinion and Order*, FCC 97-346, 13 FCC Rcd. 3460 , 1997 FCC LEXIS 5390, (released October 1, 1997.), *petition for recon. pendig, petition for review, denied, City of Abilene, Texas v. FCC*, 164 F.3d 49 (5th Cir. 1999).

would invoke such authority consistent with Section 253 of the Act and the federal law of preemption. In reaching this conclusion, the FCC identified the Congressional intent underlying the explicit grant of preemption and its application to state regulations that are contrary to Sections 251 through 261 of the Act when it found at ¶ 52:

> First, although Congress 'legislated comprehensively,' which otherwise supports the conclusion that it was 'occupying the entire field of regulation and leaving no room for the States to supplement federal Law,' (footnote omitted) Congress has made it clear that the States are not ousted from playing a role in the development of competitive telecommunications markets. Second, however, Congress did not intend to permit state regulations that conflicted with the 1996 Act. **States may 'impose requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service but only as long as the State's requirements are not inconsistent with this part.'** (footnote omitted) Thus, a state may not impose any requirement that is contrary to the terms of sections 251 through 261 or that 'stands as an obstacle to the accomplishment and execution of the full objective of Congress.' (footnote omitted) Third, Congress plainly authorized agency preemption based on a conflict between validly enacted federal rules and state requirements as approved in *Fidelity Federal Savings and Loan Association v. De La Cuesta* (footnote omitted but citation referenced, 458 U.S. 141) and the *City of New York v. FCC* (footnote omitted but citation referenced, 467 U.S. 57 (1988). However, when prescribing and enforcing rules to implement section 251, we are to preserve state access and interconnection rules that are 'consistent with the requirements of section 251' if they '[do] not substantially prevent implementation of the requirements of this section and the purposes of this part.'**(emphasis supplied)**

19. In the *Memorandum Opinion and Order* released on October 1, 1997, the FCC applied this analysis to certain Texas statutes governing telecommunications adopted in 1995 and implemented in regulations adopted by the Texas Public Utility Commission ("Texas Commission") in 1996. The FCC preempted the enforcement of portions of those statutes and regulations including associated legal requirements both under Section 253 of the Act, and/or under the Supremacy Clause of the United States Constitution. The FCC's actions were consistent with and appropriate both under Section 253 of the Act and under traditional preemption analysis. Additionally, the FCC

declined to preempt certain other Texas statutes and regulations including other legal requirements imposed by the Texas Commission because the Texas Commission interpreted them or applied the specific provision in a manner that avoided or minimized the conflicts with the Act.

20. Specifically, the FCC determined that several provisions, as applied and interpreted, affected rights under Sections 251 and 252 of the Act, but that the FCC would not preempt them because the Texas Commission represented that such provisions would not preclude parties under Sections 251 and 252 from negotiating or arbitrating more favorable terms and conditions. See ¶¶ 15, 92, 102-108, 119, 138-141, 151, 155, 159-160, 165, 171, 194, 197, 206-210, 220-223, and 218-226 of the FCC's *Memorandum Opinion and Order*. On the other hand, if an action of the State commission precludes an exercise of rights, or constitutes unwarranted restrictions on telecommunications carriers such as a binding option, the establishment of maximum resale discounts, or a minimum price for unbundled network elements, then such actions violate the preemption provisions of the Act and the Supremacy Clause of the United States Constitution. See 138-141, 159-160, 107-108, 218-223 of the FCC's *Memorandum Opinion and Order*.

21. The FCC interpreted the term "legal requirement" in Section 253(a) of the Act to include any action by a State commission approving an Arbitration Award. The FCC stated at ¶ 119:

> Section 253(a) of the Act applies only to 'state or local statutes or regulations, or other state or local legal requirement[s].' (footnote omitted) The language of section 253 is silent as to the issue of what constitutes a 'legal requirement.' Similarly, the legislative history of section 253 does not address the meaning of that term. We conclude that Texas Commission approval in 1994 of the continuous property restriction, since it has been interpreted and applied through the recent Texas Commission decisions approving the Arbitration Award, constitutes a 'legal requirement' under section 253(a). By virtue of the Texas Commissions decisions, carriers wishing to provide competing centrex service through resale are effectively

precluded from invoking the section 252 negotiation and arbitration procedures in order to obtain centrex for resale on terms more favorable than those provided under SWBT's centrex resale tariff, containing the continuous property restrictions.

As a result, the FCC preempted the enforcement of this provision under Section 253(a) of the Act.[14]

22. Similarly, the FCC was asked to determine whether a Texas regulation governing resale which imposed a "5 percent discount" from rates specified in state tariffs was a "maximum" discount and otherwise preempted. The FCC interpreted the regulation as creating a minimum discount for which greater discounts could be obtained through negotiation and arbitration under Sections 251 and 252 of the Act.[15] This same analysis is equally applicable to a State commission setting a single rate which is both a minimum and maximum for unbundled network elements. A one

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[14] See ¶ 218 of the *Memorandum Opinion and Order*. In addition, the FCC found that this restriction was preempted and otherwise unenforceable under Section 253(b), Section 253(d) and Section 251(c)(4)(B) of the Act (See ¶¶ 221, 222, and 223 of the *Memorandum Opinion and Order*). The FCC acknowledged in footnote 510 that it lacked the jurisdiction to review state arbitration decisions under Section 208 of the Act per *Iowa Utilities Board v. Federal Communications Commission, et al.*, supra. However, it concluded that it had authority under Section 253 to otherwise preempt the enforcement of this decision. Legal precedent adopted by the FCC through order, or rulemaking have the full force and effect of law. *See AT&T Communications of California Inc. v. Pacific Bell*, Supra (citing *Wilson v. A. H. Belo Corp.*, 87 F 3.d 393, 397-98 (9th Cir. 1996). In this case, the FCC chose setting precedent by order, not rulemaking.

[15] See ¶ 138 of the *Memorandum Opinion and Order*. The FCC stated:

> "We agree with the Texas Commission that PURA95 section 3.2532(d)(2) does not establish a fixed 'maximum' discount, but instead effectively establishes a minimum discount, available to SPCOA holders upon request. (Footnote omitted) If the five percent discount is unattractive, there is nothing in PURA95 section 3.2532(d)(2) that prohibits SPCOA holders from seeking to obtain flat rated local exchange service for resale from the incumbent LEC pursuant to the negotiation and arbitration provisions contained in sections 251 and 252 of the Act. Although PURA95 was enacted prior to the 1996 Act, PURA95 3.2532(d)(2)(B) effectively authorizes new entrants to obtain resale discounts in excess of five percent through the federal negotiation and arbitration procedures set forth in the Act."

It is clear that the FCC would use preemption in those circumstances in which the offending conduct either directly precludes exercising rights or has the effect of precluding parties from exercising their rights under Sections 251 and 252 of the Act. The FCC should not tolerate a situation where a telecommunications carrier could not use negotiation and arbitration to obtain more favorable terms and conditions for resale and/or interconnection.

rate requirement would not be enforceable and would violate the Act because the setting of a single rate would preclude telecommunications carriers from negotiating and arbitrating more favorable provisions under Sections 251 and 252 of the Act. On the other hand, maximum ceiling rates would be appropriate as evidenced by the FCC's establishment of maximum ceiling rates in its *Local Competition Order.*[16] Although the 8th Circuit stayed those ceiling rates based upon jurisdictional grounds, the 8th Circuit's decision was vacated by the Supreme Court.[17] Therefore, the FCC default proxy rates are binding on State commissions and must be followed.[18]

23. It is clear that the Board's action in mandating that Generic Proceeding provisions supersede arbitrated provisions is unenforceable under the doctrine of preemption and in violation of the Act for two reasons. First, it precludes a party from using negotiation and arbitration to obtain more favorable rates; and second, it renders Section 252(i) of the Act meaningless. If a telecommunications carrier must accept the Generic Proceeding provisions and those provisions are both the maximum and minimum provisions, then no carrier can ever avail themselves of Section 252(i) because there will never be more favorable provisions. This is obviously inconsistent with the Act. This creates but one option for telecommunications carriers. It is clear that Congress envisioned multiple options for telecommunications carriers. So did the FCC in its regulations implementing the Act.

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16 *See Local Competition Order*, 11 FCC rcd. 15499, 15883 at ¶ 768 (1996); 47 C.F.R. § 51.513.

17 *See AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).*

18 See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993). Supreme Court's interpretation of law is controlling and "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or post date [the Court's] announcement of the rule."

24. In the *Memorandum Opinion and Order* at ¶ 222, the FCC found that restrictions, such as binding options that are imposed upon telecommunications carriers so as to prevent negotiations and/or arbitration under the Act are preempted and unenforceable. The Texas Commission, through its approval of an arbitration proceeding, upheld SouthWestern Bell Telephone's (SWBT) centrex resale tariff restrictions (otherwise asserting that it was a non-binding option similar to other non-binding options which the FCC approved). However, the FCC rejected that position and found that the provisions were preempted. The FCC stated at ¶ 222 of its *Memorandum Opinion and Order*:

> Because the actions of the Texas Commission in the section 252 arbitration effectively preclude carriers wishing to resell SWBT's centrex service from avoiding the continuous property restrictions by invoking the negotiation and arbitration procedure, under sections 251 and 252 of the Act, we find that the continuous property restriction no longer can be viewed merely as a non-binding option. (Footnote omitted) We thus reject the contention by SWBT and the Texas Commission that SWBT's centrex resale provisions do not violate section 253(a) standing alone because carriers wishing to provide competitive centrex service through resale may negotiate for terms and conditions other than those specified in SWBT's tariff pursuant to sections 251 and 252 of the Act. (Footnote omitted). We therefore preempt, pursuant to section 253(d) of the Act, the 1994 Texas Commission decision approving the continuous property restriction since it has been interpreted and applied through the Texas Commission's decision approving the Arbitration Award.[19]

25. In the *Arkansas Preemption Order,*[20] the FCC reaffirmed the legal framework for conflict preemption under the Supremacy Clause. The FCC stated at ¶¶ 13-15:

> A federal statute preempts a state statute under the Supremacy Clause when the state statute conflicts with the federal statute or "stands as an obstacle to the

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[19] *See* footnote 509 which references ¶ 138 as an example of what the FCC considers a non-binding option.

[20] See *I/M/O American Communications Services, Inc.; MCI Telecommunications Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act pf 1934, as amended*, Memorandum Opinion and Order, CC Docket no. 97-100, FCC 99-386 (released December 23, 1999) (*Arkansas Preemption Order*)

accomplishment and execution of the full purposes and objectives of Congress."[21] Such conflict preemption may result not only from action taken by Congress. It may also result from action taken by a federal agency, but only when the agency acts within the scope of its congressionally delegated authority.[22] Pursuant to this conflict preemption doctrine, the Commission has on numerous occasions preempted state law that conflicted with federal law or stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[23]
(Footnotes 18-20 correspond to footnotes 30- 33 in the original)

Some commenters allege that section 2(b) of the Communications Act deprives the Commission of jurisdiction to preempt any provision of the Arkansas Act on the basis of alleged conflicts between the Arkansas Act and sections 251 and 252 of the Communications Act. In these commenters' view, section 253 provides the only possible authority for Commission preemption of the Arkansas Act, because only that section expressly empowers the Commission to address matters involving intrastate communications.[24] We disagree with the commenters' contention that only section 253 expressly empowers the Commission to address intrastate matters. First, in charging the Commission in section 253 of the Communications Act to preempt state or local requirements prohibiting entities from providing telecommunications services, Congress nowhere signaled an intention to remove the Commission's authority to preempt on the basis of conflict with federal laws. Indeed, *City of New York* gives the agency very broad conflict preemption authority, regardless of whether there is an express preemption provision in the statute.[25] Moreover, Congress gave the Commission, in addition to preemption jurisdiction in the 1996 Act, direct jurisdiction over certain aspects of intrastate communications pursuant to sections

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21 *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See, e.g., Louisiana PSC v. FCC*, 476 U.S. at 368-69.

22 *See, e.g., City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988); *Louisiana PSC v. FCC*, 476 U.S. at 369; *Capital Cities Cable v. Crisp*, 467 U.S. at 699; *Fidelity Federal*, 458 U.S. at 153-54.

23 *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988) (City of New York); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); *State of California v. FCC*, 75 F.3d 1350 (9th Cir. 1996); *State of California v. FCC*, 39 F.3d 919 (9th Cir. 1994); *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

24 Arkansas AG Comments at 18-20 (ACSI); Arkansas AG Comments at 11-13 (MCI); Arkansas AG Reply Comments at 2-3 (MCI); ATA Reply Comments at 3-10 (MCI); NATC Comments at 6-8, 10-11 (ACSI); NATC Comments at 4-7 (MCI).

25 *City of New York v. FCC*, 486 U.S. 57 (1988).

251 and 252 of the 1996 Act.[26]
(Footnotes 21-23 correspond to footnotes 34-36 in the original)

> Other commenters suggest that section 2(b) of the Communications Act precludes us from invoking section 253 to preempt the enforcement of a State or local legal requirement that pertains to intrastate telecommunications services.[27] These suggestions are moot, in that we do not rely on section 253 in this *Order* to preempt any section of the Arkansas Act. We note, however, that section 253 expressly empowers the Commission to preempt the enforcement of state or local legal requirements that prohibit or effectively prohibit the provision of any "interstate *or intrastate* telecommunications service."[28] Consequently, section 2(b)'s limitation on the Commission's authority over intrastate matters does not apply to the Commission's preemption authority under section 253.[29] Consistent with the Commission's preemption precedents, we will apply the foregoing principles in evaluating Petitioners' requests for conflict preemption in this proceeding.[30]
> (Footnotes 24-27 correspond to footnotes 37-40 in the original)

26. The FCC also reaffirmed the legal framework for Section 253 preemption as initially set forth in the *Memorandum Opinion and Order*. The FCC stated at ¶¶ 16-17:

> Section 253 of the Communications Act ensures that no state or local authority can erect barriers to competitive entry that might frustrate the 1996 Act's national goal of opening all telecommunications markets – including all local telephone exchange markets – to competition.[31] The Commission has already explained at length in the *Texas Preemption Order*[32] and in other orders the analysis it applies when assessing whether to preempt the enforcement of a state or local legal requirement under

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26 *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 730 (1999).

27 *See, e.g.*, NATC Comments at 5-6 (MCI).

28 47 U.S.C. § 253(a) (emphasis added).

29 *See, e.g., Texas Preemption Order*, 13 FCC Rcd at 3480, ¶ 41 n.105; *Classic Telephone Preemption Order*, 11 FCC Rcd at 13094, ¶ 24; *Silver Star Preemption Order*, 12 FCC Rcd at 15648, ¶ 18. *See generally* MCI Petition at 4-5; CPI Reply Comments at 5-6 (MCI); TRA Reply Comments at 6-7 (ACSI).

30 *See Texas Preemption Order*, 13 FCC Rcd at 3484-87, ¶¶ 50-54.

31 *See, e.g., Texas Preemption Order*, 13 FCC Rcd at 3463, 3469, 3480, ¶¶ 4, 21, 41.

32 *Texas Preemption Order*, 13 FCC Rcd at 3480-81, ¶¶ 41-45.

section 253.[33] We affirm and will apply that analysis here.(Footnotes 28-30 correspond to footnotes 41-43 in the original)

We emphasize that the burden of building a record sufficient to warrant preemption under section 253 rests principally on the party petitioning the Commission for such relief.[34] As the Commission has stated, "[i]t is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers[']' ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a)[35] without meeting the requirements of section 253(b)[36] or (c).[37] We will exercise our authority only upon such fully developed factual records."[38]
(Footnotes 31-35 correspond to footnotes 44-48 in the original)

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[33] *See, e.g., Silver Star Telephone Company Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15655-57 at ¶¶ 37, 40 (1997) (Silver Star Preemption Order), recon. denied, Memorandum Opinion and Order, FCC 98-205 (rel. Aug. 24, 1998*); New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19720-25 at ¶¶ 17-25 (1996) (New England Preemption Order), recon. denied, Memorandum Opinion and Order, 12 FCC Rcd 5215 (1997); *Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082, 13096-97, 13101-13104, ¶¶ 27, 35-42 (1996) (Classic Telephone Preemption Order).

[34] See *Low Tech Order*, 13 FCC Rcd at 1775-76, ¶ 38; *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21440 at ¶ 101 (1997) (Troy Preemption Order); *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, ¶ 32 (1997) (Pittencrieff Order), petition for recon. pending; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10 ¶¶ 35-42.

[35] 47 U.S.C. § 253(a): "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[36] 47 U.S.C. § 253(b): "Nothing in this section affects the authority of a State or local government to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunication services, and safeguard the rights of consumers."

[37] 47 U.S.C. § 253(c): Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

[38] *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101.

The Board's Establishment Of Permanent Rates In The Generic Proceeding Violates The FCC Requirement Set Forth In Paragraphs 791 And 798 Of The FCC's *Local Competition Order.*

27. In the *Local Competition Order*[39], the FCC adopted hybrid default proxy rates as ceiling rates to be used by state commissions in arbitration conducted under Section 252 of the Act. The FCC stated that these default proxy rates "will apply only until a state sets rates in arbitrations on the basis of an economic cost study, or until we promulgate new proxies based on economic cost models."[40] The FCC authorized states to replace the default proxy ceiling rates when states had completed their **own forward looking cost study** or the results produced by a generic economic cost study model approved by the FCC. See *Local Competition Order* at ¶ 791. If a state chooses to use their own forward looking cost study, that study has to be a full forward looking economic cost study that follows the guidelines set forth in this order. See *Local Competition Order* at ¶ 798.

28. The Ratepayer Advocate opines that rates established by states for use in arbitrations have to be ceiling rates and states under ¶ 791 of the *Local Competition Order* may not set only one rate which is both a minimum/maximum rate and foreclose parties from arbitrating for different rates. The FCC's analysis in the *Memorandum Opinion and Order* reinforces our position. A state by statute, regulation or legal requirement may not preclude the exercise of rights by a telecommunications carrier to negotiate or arbitrate under Section 251 and 252 of the Act. See *Memorandum Opinion and Order* at ¶ 222. The Board's Generic Proceeding rates prevent telecommunications carriers from exercising rights. Therefore, the Board's action in the Generic

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[39] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15892 at ¶ 787 (1996) (*Local Competition Order*), *rev'd in part and aff'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997) (8th Cir.), *rev'd in part and aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

[40] *See Local Competition Order* at ¶ 787.

Proceeding, the establishment of permanent rates which are both a minimum and maximum rate, conflicts with and is inconsistent with the FCC's *Local Competition Order* and the Telecommunications Act.

29. Section 252(a)(1) of the Act permits the negotiation of interconnection agreements without regard to Sections 251(b) and (c) of the Act including any pricing rules. See *Local Competition Order* at ¶ 54. This is further reflected in Section 252(e)(2) which established the standard of review for negotiated interconnection agreements. A State commission may only reject negotiated agreements if the agreement discriminates against a non-party, or if the implementation of the agreement would be inconsistent with the public interest.[41] The Board has imposed an additional hurdle which requires that the negotiated agreement include the permanent Generic Proceeding rates. This additional hurdle is inconsistent with and conflicts with the Act which states that negotiated agreements need not comply with any pricing rules. Therefore, the Board's actions are in conflict with the federal standard for review of negotiated agreements. Under federal preemption standards, the FCC should preempt the Board's Generic Proceeding rates.[42]

30. The Ratepayer Advocate submits that the record is clear that the Board rejected all cost studies offered in the Generic Proceeding as not reliable.[43] It is equally clear that the Board did not undertake to perform a full forward looking economic cost study and it had no full forward looking economic cost study when it sought to establish permanent rates. As a result, the Board

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41 See 47 U.S.C. §§ 252(e)(2)(i) and (ii).

42 See *Arkansas Preemption Order* at ¶¶ 72-77. The Ratepayer Advocate submits the FCC's analysis of Section 9(i) of the Arkansas Act fully compel and supports the preemption of the Board's Generic Proceeding rates.

43 See Generic Proceeding Order at page 61.

could not and should not have set permanent rates. The fact that they did set permanent rates is inconsistent with and conflicts with other provisions of the FCC's *Local Competition Order*. Even if the Board could set permanent rates, the Ratepayer Advocate submits permanent rates should be mere ceiling rates and not both a minimum and maximum rate. Such a result eviscerates the rights of telecommunications carriers to negotiate or arbitrate for different rates under the Sections 251 and 252 of the Act. This is inconsistent with and conflicts with the Act, the FCC's *Local Competition Order* and the FCC's *Memorandum Opinion and Order*. The Ratepayer Advocate asks the FCC to reaffirm that arbitrated rates that are within the FCC's default proxy rates (within the ceilings) by law comply with Section 252(e)(2)(b) of the Act. The Board may not supersede arbitrated rates with its own Generic Proceeding rates.

The Board's Generic Rates Can Not Be Interim Rates Under The FCC's *Local Competition Order* And Under Section 51.513(a) Of The FCC's Implementing Regulations.

31. The FCC only permits a state commission to impose interim rates if such rates are consistent with its default proxy rates. Section 51.513(a) implements this policy and provides in pertinent part:

> A state commission may determine that the cost information available to it with respect to one or more elements does not support the adoption of a rate or rates that are consistent with the requirements set forth in §§51.505 and 51.511 of this part. In **that** event, the state commission may establish a rate for an element that is **consistent with** the proxies specified in this section provided that:
>
> > (1) **any rate established through the use of such proxies shall be superseded once the state commission has completed review of a cost study that complies with the forward-looking economic cost based pricing methodology described in §§51.505 and 51.511 of this part,** and has concluded that such study is a reasonable basis for establishing element rates; and

(2) **the state commission sets forth in writing a reasonable basis for its selection of a particular rate for the element**.

32. The record is clear that the Board has not met the preconditions for setting interim rates and therefore such rates may not replace the FCC's default proxy rates. First, the Board's rates are not consistent with the FCC's default proxy rates because they are not ceiling rates, the Board's local loop rate is substantially higher than the FCC's ceiling rate of $12.47, and there is no range of rates for unbundled elements. Second, the Board provided no written basis to support as to why its rates were consistent with the default proxy rates established by the FCC. The Board's order adopting the Generic Proceeding rates does not even mention, let alone discuss, the FCC's default proxy rates and how the Board's rates are consistent with the default proxy rates. If the Board can not set interim rates under Section 51.513(a), the Board may not label them as permanent generic rates so as to avoid compliance with Section 51.513(a). The Board admits that it does not have a full forward looking cost study. It rejected all cost models in the Generic Proceeding and the Board didn't perform its own full forward-looking economic cost study consistent with §§ 51.505 and 51.511. Even if the Generic Proceeding rates were deemed interim rates under Section 51.513(a), the Ratepayer Advocate asks the FCC to reaffirm that such rates can not supersede arbitrated or negotiated rates.

33. The Ratepayer Advocate submits that the FCC only permits a State commission to supersede default proxy rates in one circumstance, and replace default proxy rates with interim rates in another circumstance. Neither circumstance exists here. The Ratepayer Advocate asks the FCC to reaffirm that (1) interim rates established under Section 51.513(a) may replace the FCC's default proxy rates but not supersede arbitrated or negotiated rates; and (2) permanent rates established by

a full forward looking cost study which complies with the act, or a generic economic cost study approved by the FCC, can replace interim rates established under Section 51.313(a) and can supersede the FCC's default proxy rates.

34. In the latter situation, the Ratepayer asks the FCC to reaffirm that only interim rates may be replaced and superseded and arbitrated permanent rates are not replaced by permanent rates. The Ratepayer Advocate interprets paragraph 693 of the *Local Competition Order* as support for this request. In paragraph 693 of the *Local Competition Order*, the FCC states:

> States may review a TELRIC economic cost study in the context of a particular arbitration proceeding, or they may conduct such studies in a rulemaking and apply the results in various arbitrations involving incumbent LECs. In the latter case, **states must replace any interim rates set in arbitration proceeding with the permanent rates resulting from the separate rulemaking.** The permanent rate will take effect at or about the time of the **conclusion of the separate rulemaking** and will apply from that time forward.

35. This paragraph on its face applies only to interim rates, and permanent rates established through arbitration are not mentioned. Therefore, arbitrated permanent rates which comply with the Act remain valid between the parties. If the FCC intended permanent arbitrated rates to be set aside the FCC could have easily said so. The FCC did not.

36. The Ratepayer Advocate submits that there is an obvious procedural infirmity as well that precludes the Board from enforcing the Generic Proceeding rates. The Board replaced interim rates with Generic Proceeding rates despite the fact that the rulemaking proceeding has not concluded. There are matters still pending before the Board regarding this proceeding. Therefore, the Board's "Generic Proceeding rates" (so called "permanent rates") can not be effective at this time under paragraph 693. The Ratepayer Advocate filed an appeal in the Appellate Division seeking

review of the Board's actions in establishing generic rates. The Board and BA-NJ argued that the no final appealable decision existed because the generic proceeding had not concluded. The Appellate Division dismissed the Ratepayer Advocate's appeal as premature without prejudice. See Exhibit F to the attached Affidavit. If the rulemaking is not final, then rates resulting therefrom can not be given effect and replace interim rates without violating paragraph 693 of the *Local Competition Order*. The proceeding has not been concluded.

37. There is a second procedural infirmity. The Ratepayer Advocate submits that the Board failed to follow the procedural requirements set forth in paragraph 619 of the *Local Competition Order* and codified at Section 51.505(e) in its conduct of the Generic Proceeding.

38. The Board initiated the Generic Proceeding prior to the Act and subsequently changed its scope after the passage of the 1996 Act. The Board issued an Order on June 20, 1996 that stated that the rates arising from the generic proceeding would not supersede arbitrated rates and they are **guidelines**. During the proceeding, but without further notice to all affected parties,[44] the Board reversed course. What the Board originally characterized as **guidelines** became a substantive requirement that the Board enforced as an order. However, such a substantial reversal requires notice and opportunity for all affected parties to participate.[45] The Board did not file an amended

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[44] The Ratepayer Advocate notes that the Board gave notice to the participants in the Generic Proceeding but the participants in the Generic Proceeding are not all affected parties. The promulgation of guidelines do not have the force and effect of law. When the Board decided to change from guidelines to legal requirements, more than just notice to the current participants is required. Notice to the public is required. No such notice was given.

[45] The Ratepayer Advocate submits that once the June 20, 1996 Order was issued by the Board, the subsequent change directed by the Board in its Generic Proceeding Order on December 2, 1997, required as a matter of due process, the filing of an amended notice of rulemaking with notice and comment to all affected parties. See Dissenting Statement of Commissioner Harold Furchtgot-Roth in the *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) and cases cited therein.

notice consistent with procedural due process and the Board did not open the proceeding to all affected parties as required by the *Local Competition Order*, paragraph 619. Because the Board's action in superseding rates affects all pending and future interconnection agreements, notice and comment was required. No notice was issued. Paragraph 619 of the *Local Competition Order* provides:

> In setting a rate pursuant to the cost-based pricing methodology, and especially when setting a rate above a default proxy ceiling or outside the default proxy range, the state must give full and fair effect to the economic costing methodology we set forth in this Order and must create a factual record, including the cost study, sufficient for purposes of review **after notice and opportunity for the affected parties to participate**.
> (See 51.505(e) to the same effect)

39. The Board did not meet any of these conditions. The substitution of generic rates for arbitrated rates was done without notice and opportunity to affected parties. The Board gave no notice that it might require rates higher than the FCC's default proxy rates. It might not set rates as ceiling rates, and it might eliminate range of rates and would set only maximum/minimum rates. As a result, the Board, under due process, was required to issue a further notice of proposed rulemaking and publish it in accordance with the requirements of the applicable administrative procedure acts so that all affected parties would be apprised of its reversal in position. This procedural defect violates and conflicts with paragraph 619 of the *Local Competition Order* and precludes the substitution of Generic Proceeding rates for arbitrated rates.

The Facts Show That The Board's Generic Proceeding Rates Which Establish Both A Minimum And Maximum Rate Erect Barriers To Competitive Entry And Frustrate The Goal Of Opening Local Telephone Exchange In New Jersey In Violation of Section 253(a) Of The Act.

40. As explained above, the Board's action in establishing Generic Proceeding rates which are a single rate, a minimum and maximum rate, for pricing of UNEs means that telecommunications carriers are prohibited from negotiating or arbitrating different rates. No telecommunications carrier has been able to negotiate or arbitrate rates that are different than or vary from the Generic Proceeding rates. The reasons is obvious. The Board requires that all interconnection agreements include the Generic Proceeding rates. By order dated October 16, 1999, the Board required BA-NJ to file a report to demonstrate BA-NJ's compliance with the Board's Generic Proceeding Order. That compliance filing shows that all interconnection agreements and resale agreements currently in effect include the Generic Proceeding rates. Specifically, the compliance report acknowledges that the Board's Generic Proceeding Order requires the following rates:

- Unbundled loops are offered at the average rates of $16.21 deaveraged in three density cells of $11.95, $16.02 and $20.98.[46]
- Unbundled switching, at rates of $1.90 for the port and an average $.00432 per minute of use that equates to $.005418 per originating minute of use and $.003207 per terminating minute of use.[47]
- Reciprocal compensation rats for "Local Traffic" of $.003738 for tandem termination and $.001846 for end office termination on a per minute basis.[48]

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46 See Generic Proceeding Order at page 255.

47 Id. at page 255.

48 Id. at page 256.

- Apply all other recurring and nonrecurring rates stated in the Generic Order Attachment 1.[49]

- Apply the following wholesale discounts rates for resale: (1) 17.04% for resellers using BA-NJ operator services and (2) 20.03% for resellers using their own operator services.[50]

41. Furthermore, the compliance report shows that as of January 11, 2000, BA-NJ entered into 47 interconnection agreements with CLECs all of which have the Generic Proceeding rates.[51] Similarly, the compliance report shows that BA-NJ has entered into 94 agreements with resellers all of which include the Generic Proceeding rates.[52] BA-NJ has only resold 96,294 lines (44,737 residential lines and 51,557 business lines) under resale agreements as of November 30, 1999. This is less than 1.5% of all BA-NJ lines in New Jersey. The resold residential lines represent about 1% of all residential lines. Under interconnection agreements as of December 31, 1999, BA-NJ has provided only 5,088 unbundled analog loops, 627 unbundled ISDN loops and 1,581 ADSL loops. This is less than 1% of BA-NJ's lines in New Jersey. The FCC's Local Competition Report dated August 1999 demonstrates that New Jersey is lagging behind in local exchange competition. Table 3.1 shows that 57,000 lines have been resold for a percentage of 0.9 and table 3.3 shows that less than 1,000 UNE loops have been provided to CLECs which is less than 0.05% of all BA-NJ's lines.. These reported figures for New Jersey are well below the national average.

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[49] Id. at page 256.

[50] Id. at page 261.

[51] Thirty-two interconnections agreements have been approved by the Board. Twelve are currently pending before the Board for approval and three have not yet been docketed. Fifteen interconnection agreements with wireless carriers have been filed with the Board of which eleven have been approved, three are pending, and one agreement has not yet been docketed.

[52] Fifty-four resale agreements have been approved by the Board. Thirty-one additional agreements are currently pending Board approval and nine have not yet been docketed with the Board.

42. The Ratepayer Advocate submits that the lack of competition is directly related to the Board's action in establishing permanent Generic Proceeding rates which are inconsistent with and conflict with the FCC default proxy rates. The Board has forced telecommunications carriers to accept these rates. The Board has eviscerated the Federal Telecommunications Act by denying carriers the ability to negotiate and arbitrate for different rates under Section 251 and 252 of the Act.

43. The Board's single rate approach which is both a minimum and maximum rate has ensured that no telecommunications carrier will spend the time and resources to negotiate or arbitrate for different rates. The fact is that every interconnection or resale agreement in New Jersey has the same rates because the Board will not accept an agreement for approval unless the Generic Proceeding rates are included. The Board's order as applied and interpreted requires that the Generic Proceeding rates supersede all arbitrated rates.[53] As long as the Board's Generic Proceeding rates remain in place, telecommunications carriers, for all practical purposes, are foreclosed and prohibited from exercising rights afforded them under the Act and the FCC's implementing regulations. As discussed above, Section 252(i) is unavailable to telecommunications carriers in New Jersey as it applies to Generic Proceeding rates. This violates Section 252(i) and the FCC's rules set forth in Section 51.809 of the Code of Federal Regulations.[54]

44. In addition, the Board's action insulates BA-NJ from the obligation to provide CLECs with interconnection and unbundled network elements pursuant to terms, conditions, and cost-based rates that are just, reasonable, and non discriminatory, to offer retail services to competing LECs

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[53] The Board in the Generic Proceeding Order directed that its rates would supersede arbitrated rates. The Board approved the AT&T Interconnection Agreement with BA-NJ but only the version with the permanent Generic Proceeding rates even though AT&T negotiated for permanent rates.

[54] 47 C.F.R. § 51.809. See *Local Competition Order* at ¶¶ 1299-1323.

pursuant to terms, conditions, and wholesale rates that are reasonable and non-discriminatory, and to negotiate in good faith with competing LEC. BA-NJ does not negotiate or arbitrate for rates different from the Generic Proceeding rates because the Board's order does not permit it. This simply violates and frustrates Sections 251 and 252 of the Act.

45. The Board's Generic Proceeding rates are also inconsistent with and in violation of the pricing standard set forth in Section 252(d) of the Act. Under Section 252(d), rates must be based upon costs and determined without reference to a rate-of-return or other rate-based proceeding. As a result, the FCC adopted TELRIC pricing and required states to comply with TELRIC pricing.[55] Section 51.505(d)(1) of the FCC's implementing regulations prohibit consideration of embedded costs in calculating forward-looking economic costs.

46. The Generic Proceeding rates set by the Board are at or close to the embedded costs of BA-NJ in New Jersey. For example, the deaveraged local loop rate was set at $16.21. The USF cost per loop, an embedded cost, reported by National Exchange Carriers Association ("NECA") for New Jersey for 1995, which was the most current data at the time that the Board established the $16.21 rate, was $16.26 The Board's local loop rate was 99.7% of the reported USF rate. The embedded cost in New Jersey for 1997 was $16.03,[56] which is less than the Generic Proceeding rate. The NECA USF cost per loop in 1998 was $17.04. The Board's local loop rate is 95% of reported USF rate. The Board's local loop rate is well above the FCC's default proxy ceiling rate of $12.47. The Ratepayer Advocates submits that the Board's local loop rate is a rate based upon embedded

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[55] See Section 51.505, 47 C.F.R. § 51.505.

[56] NECA reports the USF cost per loop which is an embedded cost of the unseparated loop as a dollar amount. For example in 1997, NECA reported for New Jersey an USF cost per loop, embedded cost of $192.46. When you divide this cost by 12, you get a monthly cost of $16.03.

costs in direct violation of Section 51.505(d)(1). The Board's Generic Proceeding rates reflect embedded costs and not forward looking costs as required by the FCC.

47. As a result, the Ratepayer Advocate submits that Board's action prohibits or in the alternative has the effect of prohibiting the ability of telecommunications carriers to provide intrastate services and interstate services in New Jersey consistent with Sections 251 and 252 of the Act. Therefore, the FCC should preempt the Board's Generic Proceeding rates under Section 253(a) of the Act.

CONCLUSION

In view of the foregoing, and based upon the Attached Affidavit submitted in support of this Petition, the Ratepayer Advocates asks the FCC to declare that preemption is warranted under the Supremacy Clause and under Section 253(a) of the Act because (1) the Board's Generic Proceeding rates were set without having a forward looking economic cost study or a generic cost model approved by the FCC; (2) such rates can not be "permanent rates" nor can they be interim rates due to non compliance with Section 51.513(a); (3) the Board's actions are inconsistent with and conflict with the Act, the *Local Competition Order* and FCC regulations; and (4) the Board's Generic Proceeding rates violate Section 51.505(d)(1) of the FCC's Rules. As a consequence, the Ratepayer Advocate asks the FCC to preempt the Board's Generic Proceeding Order, in so far as it seeks to impose Generic Proceeding rates on telecommunications carriers as a precondition for approval of an interconnection agreement, and declare that the Board may not enforce these rates as a precondition for the review of an interconnection agreement under the Act. The Ratepayer Advocate asks the FCC to also declare that the Board's Generic Proceeding rates do not supersede arbitrated rates, permanent or interim, that otherwise comply with the Act and that such rates can

not be imposed on telecommunications carriers so as to foreclose negotiation or arbitration of lower rates under Sections 251 and 252 of the Act.

Respectfully submitted,

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Dated: March 3, 2000